

89-1844

Supreme Court, U.S.

FILED

MAY 22 1990

JOSEPH F. SPANIOL, JR.  
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NO. \_\_\_\_\_

IN THE SUPREME COURT  
OF THE UNITED STATES  
OCTOBER TERM, 1989

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RICHARD THOMAS McLENDON, PETITIONER

V.

CHARLES B. PETTEY, RESPONDENT

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PETITION FOR WRIT OF CERTIORARI  
TO THE COURT OF APPEALS FOR THE  
TWELFTH COURT OF APPEALS DISTRICT  
OF TEXAS

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PETITION FOR WRIT OF CERTIORARI

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PETITIONER, Pro Se



## QUESTIONS PRESENTED

The basic question, encompassing a number of subsidiary questions, is whether the state court of first instance and the state court of last resort, by their respective actions specified below, erroneously deprived the Petitioner herein of personal rights, in violation of the due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States.

### A. Actions of the trial court:

1. Where an allegation of material and prejudicial jury misconduct, substantiated by affidavit and positive, uncontroverted testimony, was made in the trial court, the trial judge nonetheless overruled a motion for mistrial for jury misconduct and likewise overruled a motion for new trial in which the issue was again raised.

2. Where the court of appeals ordered the

trial court to conduct an evidentiary hearing, after the Respondent herein disputed Petitioner's allegation, substantiated by affidavit and by a detailed report on internal evidence of tampering, that the official court reporter's statement of facts in the case had been falsified, and where Petitioner filed a motion for discovery of the court reporter's original shorthand notes and audio tape recordings needed to prove his allegation, the trial judge imposed extraordinary restrictions on discovery which effectively prevented discovery, and then required Petitioner to present his case severely debilitated by the lack of discovery.

3. Where the trial court's order purporting to validate the statement of facts was void on its face, under existing state rules of procedure, because the order granted an "additional

judgment" against the Petitioner and was signed more than nine months after the court's plenary power had expired, and where an issue was also raised concerning the alleged disqualification of the trial judge by reason of his personal interest in the subject matter of the hearing, the judge refused to vacate the void order, despite the filing of motions requesting relief therefrom and setting forth objections thereto.

B. Actions of the court of appeals:

1. On the basis of the trial court's void order specified above, the court of appeals overruled Petitioner's previous motion to direct the court reporter to prepare a new statement of facts in conformity with the rules, despite the Petitioner's contention that he was deprived of his right to an adequate judicial review of the record on appeal.
2. The court of appeals overruled a

motion to recuse, without comment, although the impartiality of the Chief Justice of the court of appeals had been reasonably questioned by virtue of his long-term close personal friendship with the trial judge, who was at that time placed in adversarial alignment against the Petitioner.

3. When Petitioner attempted to file a petition for writ of mandamus to set aside the trial court's void order, the court of appeals denied leave to file the petition on the grounds that the matter was already before the court and Petitioner had an adequate remedy by appeal, yet when Petitioner filed motions to set aside the trial court's void order and to rescind the orders of the court of appeals which were based upon the trial court's void order, both motions were overruled without comment.

4. In its opinion and supplemental

opinion on motion for rehearing, the court of appeals passed over in silence the essential issue which had been raised concerning the voidness of the trial court's "additional judgment" order and the related issue concerning the denial of Petitioner's rights and prevention of a proper presentation of his case on appeal.

NOTE: The names of both parties to this action appear in the caption of the case. There are no other parties to the proceeding in the court whose judgment is sought to be reviewed.

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for writ of certiorari is bound  
separately.

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NOTE: Opinions of the lower court have  
not been published in this case.

## STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Twelfth Court of Appeals District at Tyler, Texas, was entered on February 23, 1989; a motion for rehearing was overruled on May 12, 1989. An application for writ of error was denied by the Supreme Court of Texas on October 4, 1989, and a motion for rehearing was overruled by that court on February 21, 1990.

The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is Title 28, U.S.C., Sec. 1257(a).

The constitutional provision involved in this case is Amendment 14, section 1, of the Constitution of the United States. The relevant section reads as follows:

1. All persons born or

naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.  
(U.S.C.A. Const. Amend. 14, Sec. 1)

#### STATEMENT OF THE CASE

This case originated in the Second Judicial District Court of Cherokee County, Texas. Following an incident in which Richard Thomas McLendon fired a round of birdshot at the ground in his own back yard as a warning to Charles B. Pettey, an exceptionally troublesome neighbor who persistently trespassed on McLendon's property despite repeated verbal orders to vacate the premises, Pettey brought suit against McLendon,

claiming damages for alleged personal injuries. The trial court awarded Pettey "actual" damages in the amount of \$5,000.00 and "punitive" damages in the amount of \$5,000.00 (for a total of \$10,000.00), plus interest accruing at the rate of 10% per annum from the date the judgment was entered (August 20, 1987) and costs of court; the court also granted Pettey's request for a permanent injunction, enjoining McLendon, his agents, servants and employees from committing specified criminal acts at Pettey's home. (Transcript, 82.)

While on the surface this would appear to be a simple case unlikely to raise federal questions or require intervention by the Supreme Court of the United States to ensure justice, the emergence of a clear pattern of unfair, unjust, and ultimately discriminatory abuses of judicial power by the state

courts, acting under authority of the State, calls into play those provisions of the United States Constitution, the due process and equal protection clauses of the Fourteenth Amendment in particular, which were designed to safeguard the rights, liberties and immunities of the individual against unwarranted encroachment by the State. Moreover, since Texas law closely parallels federal constitutional law with regard to such rights, liberties and immunities of the individual, there would be little need to make appeal to federal law in this case, were it not for the fact that the state courts have obstinately refused to decide, address, or even acknowledge the existence of certain issues raised by your Petitioner.

Under the circumstances, it should not be surprising that direct references

to the United States Constitution are notably rare in the documents filed in the courts below; yet notice must be taken that questions of constitutional law are clearly implied in numerous instances.

Without doubt the most disturbing single aspect of this case as it proceeded through the state courts has been the total frustration of all efforts by the appellant (now Petitioner) to obtain an accurate and complete record for adequate judicial review on appeal. The underlying problem is set forth in his Motion to Direct Court Reporter to Prepare a New Statement of Facts, originally filed in the court of appeals on August 10, 1988; a copy of the motion, attached to an order directed to the trial court, was filed in the trial court on September 1, 1988. (Supplemental

Transcript,5.)

Subsequent events led him to point out repeatedly to the trial court and to the court of appeals that their actions (and in some instances their failure to take appropriate action) deprived him of his rights and prevented the proper presentation of his case on appeal.

For example, a document filed in the trial court on December 13, 1988, and titled Objection to Court's Failure or Refusal to Rule on Motion, contains the following specific language:

The Court's continuing failure or refusal to rule on the Motion to Vacate Order Affecting Judgment has severely impeded and, in fact, prevented the proper presentation of this cause to the Court of Appeals.

A Motion for Rehearing of (1) Motion to set aside Trial Court's Order affecting Judgment and (2) Motion to rescind Orders Based on Trial Court's Void Order, filed in the court of appeals



on March 6, 1989, contains the following language:

Because the trial court's order affecting judgment was signed while the trial court did not have plenary jurisdiction over the case, it is wholly void, on its face, as a matter of law, under T.R.C.P. 329b, and should be struck down.

### III.

The orders of the Court of Appeals specified in the Motion to Rescind Orders Based on Trial Court's Void Order are void because they were based upon the trial court's void order of September 20, 1988, and therefore should be struck down.

### IV

Under the circumstances of the case, the facts and the law dictate that the Court's discretion can be exercised in but one way, in each of these situations.

### V.

The Court's abuses of its discretion in overruling the two motions identified above are reasonably calculated to deprive the Appellant of his rights and to prevent the proper presentation of the case on further appeal \* \* \*.

For a fuller discussion of the issues, please refer to the Motion for Rehearing filed in the Supreme Court of Texas on October 19, 1989; a complete copy of the motion is included in the Appendix to this Petition for Writ of Certiorari. The Motion for rehearing contains the following statements:

McLendon respectfully submits that this Court erred in grounding its order upon the following notation \* \* \* "Writ Denied," in that the points of error brought forward in the application involve fundamental issues of jurisdiction and a litigant's constitutional rights to have his case tried by a fair and impartial tribunal, to appeal, and to be accorded due process of law.

\* \* \* \* \*

The right to appeal is a right inherently invested by virtue of both the Texas Constitution and the United States Constitution, and interference with that right deprives a litigant of due process of law.

Please note that the relevant

portions of the trial court's void order of September 20, 1988, which purports to validate the falsified statement of facts prepared and submitted in this case, are quoted or summarized in the Motion for Rehearing specified above.

#### ARGUMENT

This case is somewhat novel inasmuch as the Petitioner herein was unable to discover any cases in the literature which are closely analogous. This would suggest, however, not that the problems encountered in this case are uncommon, but rather that such problems have been neglected or largely ignored in the past.

Certainly, a defendant or appellant in a civil action has the same entitlement to due process of law and equal protection of the laws as have defendants or appellants in criminal cases. Moreover, the actions of state judges should be

subjected to the same close scrutiny as are the official acts of members of the executive and legislative branches of state government.

The principles enunciated in the cases listed below, even though taken out of specific context, appear to have direct relevancy to the instant cause.

The action of state courts and of judicial officers in their official capacities is to be regarded as action of the state within the Fourteenth Amendment. Shelley et ux v. Kraemer et ux, McGhee et ux v. Sipes, et al, 1948, 68 S. CT. 836.

This clause [of the Fourteenth Amendment] requires that action by state through any of its agencies must be consistent with fundamental principles of of liberty and justice which lie at the base of our civil and political institutions. Buchalter v. People of

State of New York, N. Y. 1943, 63 S. Ct. 1129, 319 U. S. 427, 87 L. Ed. 1492. Touchstone of this clause is protection of the individual against arbitrary action of government. Zannino v. Arnold, C. A. Pa. 1976, 531 F. 2d 687.

In the instant cause, the dispute concerning the alleged falsification of the official court reporter's statement of facts was properly referred to the trial court for an evidentiary hearing pursuant to a provision of Rule 55(a) of the Texas Rules of Appellate Procedure. A serious problem arises, however, when a presumption is made that whatever ruling the trial judge may make, no matter how arbitrary and unreasonable, is absolutely final and unassailable.

Rules of practice and procedure are devised to promote the ends of justice, not to defeat them, and orderly rules of procedure do not require sacrifice of the


rules of fundamental justice. Hormel v. Helvering, Commissioner of Internal Revenue, 1941, 61 S. Ct. 719.

Finally, concerning both the allegation that the trial judge was disqualified to sit as a court in the matter in controversy in the hearing on September 20, 1988, and the refusal of the Chief Justice of the court of Appeals to recuse himself, the following notation is appropriate: Observance of right to an impartial judge is required to meet minimum standards of due process. Taylor v. New York City Transit Authority, D.C. N.Y. 1970, 309 F. Supp. 785, affirmed 433 F. 2d 665.

## CONCLUSION

Because this petition for writ of certiorari raises serious and substantial questions of constitutional law which have a direct bearing not only on the proper administration of justice in state courts, but also on the daily lives of all members of our society, either directly or indirectly, Petitioner prays the Court to accept his petition and docket the case for review.

Respectfully submitted,



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